Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Nos. CV-04-1874-PCT-ECV & 07-15840

IN THE

SUPREME COURT OF THE UNITED STATES

MORLEY

Petitioners

v.

SMITH et al.

Respondents

On Petition For Writ of Certiorari
To the Ninth District Court of Appeals
District of Arizona

PETITION FOR WRIT OF CERTIORARI

Christopher Morley
Arden Morley
PETITIONERS PRO SE
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QUESTION PRESENTED

The question presented is how much notice, what form of notice, and what is the effect of lack of notice before a FRCP rule 12(b)(6) motion to dismiss can be converted into a FRCP rule 56 motion for summary judgment. There is a conflict among the Circuits regarding this issue. It therefore involves issues of fundamental importance to the consistent interpretation and application of the federal rules of civil procedure as they impact on dispositive motions.

PARTIES TO THE PROCEEDING

All parties DO NOT appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs:

Christopher Morley
Arden Morley

Defendants:

Steve Allesio
Kristine C. Allesio
James Smith
Lorre Smith

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OPINIONS BELOW

The opinions of the lower courts are unpublished.

JURISDICTION

A timely Petition for Rehearing was denied by the United States Court of Appeals on January 16, 2009, and a copy of the order denying rehearing appears at Appendix A. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition for a writ of certiorari involves the proper interpretation of the Federal Rules of Civil Procedure. Namely, FRCP rules 12(b)(6) and 56.

STATEMENT OF THE CASE

Christopher and Arden Morley (the "Morleys") appealed the United States District Court of Arizona's dismissal of their defamation and defamation per se claims against all defendants under Federal Rules of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). The Morley's also appealed a magistrate judge's grant of summary judgment under Federal Rule of Civil Procedure 56 ("Rule 56") with respect to a trade libel claim against Steve and Kristine Alessio (the "Alessios") and Harry and Ruth Todice (the "Todices") The Ninth Circuit assumed jurisdiction pursuant to 28 U.S.C. Section 1291 and 28 U.S.C. Section 636(c) (3) and affirmed the judgment of the district court on January 16, 2009. A motion for rehearing was denied on February 9, 2009 and the mandate was entered on February 17, 2009.

The Ninth Circuit was in error in their decision as the Todices had already been dismissed from the case. The appeal was actually against the Alessios and the Smiths. It was not against the Todices. The Ninth Circuit made specific mention of the Alessios, and the Todices, but made no mention of the Smiths in their rulings.

On the defamation and defamation per se counts, the Morleys alleged in their first amended complaint that Plaintiffs Arden and Chris Morley were international breeders of Savannah cats and belonged to the International Cat Association ("TICA"). Defendants Alessio and Smith were also cat breeders who belonged to TICA.

Defendants allegedly became concerned that Plaintiffs were misrepresenting their Savannah cats to po-

tential buyers. Defendants sent a mass-distribution email to members of TICA and distributed to others outside the organization accusing Plaintiffs of fraud and requesting that those they contacted please sign a petition being presented to TICA's board of directors to have Plaintiffs removed from TICA. The first amended complaint alleged defamation, defamation per se and trade libel among other counts.

In considering the Alessios motion to dismiss, the district court concluded that the alleged defamatory communications were not made to people outside TICA membership, a fact that the Ninth Circuit acknowledged was simply not part of the pleadings, and in fact, was not true. Plaintiffs had presented evidence proving that these communications and the defamation was disseminated to non-TICA members and members of the general public, some of whom were potential customers of the Plaintiffs. Rather than reach the obvious conclusion, however, that the district court improperly dismissed the first amended complaint, the Ninth Circuit determined that the district court's failure to exclude this alleged information converted the 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment albeit with no formal or even informal, contemporaneous notice, and even though such alleged information was not in the record, and did not exist.

Acknowledging that the district court had failed to give formal notice of such a conversion, the Ninth Circuit noted that the district court was required to give a "reasonable opportunity to present all material made pertinent to such a motion by rule 56." FRCP, Rule 12(b). The Ninth Circuit ruled that because (a) many months later the parties briefed and argued a

motion for summary judgment that included a trade libel claim that was somewhat similar although admittedly distinct and different, (b) the briefings and arguments on the trade libel issue allegedly provided information relevant to the defamation and defamation per se claims on a summary judgment standard, and (c) the record on trade libel was before the court, plaintiffs had the "reasonable opportunity" rule 12(b) required. However, the Ninth Circuit was in error, as the District Court relied on their dismissal of the defamation claim early on to dismiss the trade libel claim four years later. The district Court essentially said that without the defamation, which they had already dismissed four years prior, there could be no basis for a trade libel claim, so they dismissed the remainder of the case, even before discovery had been concluded. In fact, the Alessios' depositions had been scheduled, but the District Court's granting of summary judgment prevented Plaintiff's from ever deposing these key defendants.

This petition has nationwide importance as it is brought to address a conflict between the circuits as to the amount of notice, form of notice, and effect of lack of notice before a motion to dismiss can be converted into a motion for summary judgment. It therefore involves issues of fundamental importance to the consistent interpretation and application of the federal rules of civil procedure as they impact on dispositive motions.

REASONS FOR GRANTING THE PETITION

Where evidence outside the pleadings is presented as part of a Rule 12(b)(6) motion, the court has discretion to consider or reject such evidence. The motion is converted into a summary judgment motion only if the court decides to consider such evidence. FRCP, Rule 12(b). Skyberg v. United Food and Commercial Workers Union. There must be some indication in the court's ruling or order that the evidence was actually relied upon by the court. *Fernandez-Montes v. Allied Pilots Association*, 987 F 2d 278, 283 (5th Cir. 1993); *EEOC v. Reno*, 758 F 2d 581, 583 FN 6 (11th Cir. 1985); *Kearns v. Tempe Technical.* 110 F 3d 44, 46 (9th Cir. 1997).

In this case, the Ninth Circuit deemed the motion to dismiss to have been converted into a summary judgment motion even though there was no indication the district court ever intended to convert it and even though the Ninth Circuit admittedly simply speculated as to what the evidence might be as it was not in the record. Therefore, for all practical purposes the Ninth Circuit simply abrogated the requirement that the district court decide to consider such evidence and actually rely upon it before the motion is converted. This court should clarify what is required for a reviewing court to determine that the district court has exercised its discretion to consider evidence outside the record so as to convert a motion to dismiss into a motion for summary judgment.

Second, the opposing party must be made aware of the district court's election to treat the 12 (b)(6) motions as converted and must be given a "reasonable opportunity" to present rebutting evidence before the

ruling. *Mack v. South Bay Beer Distributors, Inc.* 798 F. 2d 1279, 1282 (9th Cir. 1986); *Briggs v. Ohio Elections Commission*, 61 F. 3d 487, 493 (6th Cir. 1995); *Moskowitz v. Vitalink Communications corp.*, 751 F. Supp. 155, 158 (ND Ca 1990). In our case the Ninth Circuit deemed the motion converted with no district court notice formal or informal. Indeed the Ninth Circuit nonsensically indicated that the opportunity to defend an unrelated summary judgment motion on a trade libel claim which presented different considerations well over a year later sufficed for a reasonable opportunity to defend a summary judgment on the earlier defamation and defamation per se counts which were decided on the pleadings with no opportunity for any discovery.

The Ninth Circuit absurdly held that the notice required does not have to be prior or even contemporaneous notice but can occur years after the fact such that summary judgment is granted in the absence of any real notice and with no discovery. And, in fact, the Circuit Court relied on their early dismissal of the defamation and defamation per se in dismissing the trade libel claim as well. This contradicts the requirement of many cases from other circuits which require the same 10 day notice period required on a rule 56 motion for summary judgment. *Davis v. Howard*, 561 F. 2d 565, 571 (5th Cir. 1977). As with normal Rule 56 motions, the hearing may be postponed if necessary to allow the opposing party the time to conduct discovery to develop facts in opposition to the motion. FRCP, Rule 56f. *Grove v. Mead School district No 354*, 753 F. 2d 1528, 1532 (9th Cir. 1985). However, with depositions pending, and the District Court granting summary

judgment prematurely, the Plaintiffs were prevented from completing normal case discovery, much less discovery to support any opposition to the motion to dismiss. This court should grant certiorari to clarify the amount and timing of the notice requirement before conversion takes place to avoid manipulation of the rules so as to deprive parties of minimal due process.

This court should also clarify the form of notice required to effectuate such a conversion. Most circuits have held that a court need not make a formal order converting the motion but the record must show the opposing party was fairly apprised that the court would look beyond the pleadings thereby transforming the motion into a summary judgment motion. *Grove cv. Mead School District, supra*, 753 F. 2d at 1532. Specifically the circuits are split as to whether the moving party's submission of extrinsic evidence by itself, or even the court's statement that it had considered such evidence constitutes notice to the opposing party that a summary judgment is being considered. *See Milburn v. United States*, 734 F. 2d 762, 766 (11th Cir. 1984). Other cases are contra: i.e., where declarations are attached to a rule 12 (b)(6) motion, "the inclusion of these materials .. put (opposing party) squarely on notice that the court had the option of treating the motion as one for summary judgment." *Rodriquez v. Fullerton Tire*, 115 F. 3d 81, 83 (1st Cir. 1997).

In this case, the Smiths and Alessios, as well as all other defendants, had filed declarations in suppor of their motion to dismiss addressing issues of personal jurisdiction and the Morley's responded with their own declarations. The declarations do not even address dissemination of the defamatory material outside the

TICA complaint or outside its membership and therefore do not address issues of qualified privilege, which should have been considered by the District Court. Surely, under these circumstances it is ridiculous to suggest that these extraneous materials gave any notice that the court intended to convert the motion to dismiss into a summary judgment motion on qualified privilege based upon dissemination to third parties exceeding the scope of the privilege. This court should grant certiorari to clarify the form of notice that must be given to convert and the nature and content of the extraneous materials that must be submitted for the notice requirement to be deemed to have been satisfied.

The court's failure to give actual notice of its intent to convert may be harmless error if the opposing party is not prejudiced thereby. *EEOC v. Green*, 76 F. 3d 19, 24 (1st Cir. 1996). Lack of notice is harmless where the nonmoving party has submitted materials outside the pleadings on issues relevant to its opposition to the motion to dismiss. *Madewell v. Downs*, 68 F. 3d 1030, 1048 (8th Cir. 1995). But in our case, no declarations address whether dissemination had occurred outside TICA, but address only issues of personal jurisdiction. Even if the court improperly relied on extrinsic material, a dismissal may still be made where rule 12(b)(6)'s standards are met without reference to the extrinsic material. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F. 3d 1423, 1430 (7th Cir. 1996). But in our case, not only did the District Court not have any extrinsic material alleging there was no dissemination of communications outside of TICA, they did in fact, have Plaintiffs' evidence

proving that dissemination of said communications absolutely were made to persons not affiliated in any way, shape, or form, with TICA and these errors were not harmless since the first amended complaint did not specify that dissemination was limited to TICA and therefore the Ninth Circuit acknowledged that extrinsic evidence shockingly not even in the record for its review must have been considered to justify the appellate court in upholding the ruling.

Finally, as with a motion for summary judgment, the court has discretion to defer ruling on the motion, if discovery is shown to be necessary to respond to the other party's factual showing. FRCP, Rule 56(f). In our case, however, no Defendants presented any factual showings, and the Morleys were given no such opportunity to pursue discovery nor were they given an opportunity even to request it before the court prematurely ruled.

CONCLUSION

In sum, this case has nationwide importance because it presents numerous issues on the interpretation and application of the "speaking" Rule 12(b)(6) motion that have divided the circuits for many years. This court should grant certiorari to address the amount and form of notice required and the proper standards to be used by the circuits in guiding their discretion in effectuating such conversions.

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RESPECTFULLY SUBMITTED this 7th day of May, 2009.

Christopher Morley
Petitioner Pro Se

Arden Morley
Petitioner Pro Se

APPENDIX A:

Decision of District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christopher and Arden Morley	)	No. CV-04-1874-PCT-ECV
Plaintiffs,	)	
	)	ORDER
v.	)	
LORRE SMITH; et al.,	)	
Defendants,	)	

Pending before the court are the Alessio Defendants' Motion to rule 54(b) Judgment (Doc. #151) and the Todice Defendants' Notice of Lodging of form of Judgment (Doc. #132).

Regarding the Alessios, the court granted their motion for summary judgment on all claims on January 24, 2007. Plaintiffs argue in their Response to Motion for Rule 54(b) Judgment (Doc. #156), that because four defendants remain in this action, granting a final judgment for the Alessios is not judicially economical. They argue that appeals against the various defendants would have to be filed separately. They contend that to avoid a confusion, the better approach would be to issue one final judgment at the end of the case.

Plaintiffs' argument is not persuasive. The facts supporting summary judgment in favor of the Alessios are not the same as the facts that pertain to the other defendants. Thus, appeals against the various defendants will differ to some degree anyway. Moreover, because some defendants remain in the action, it is not clear that an appeal will ever be necessary against them. The court finds no just reason to delay the entry of final judgment and directs that such judgment be entered with respect to the Alessio Defendants.

Regarding the Todice Defendants, they too seek a final judgment pursuant to Rule 54(b) in light of the court's order granting their motion for summary judgment. Plaintiffs have filed an Objection to Lodged Form of Judgment and State of Costs (Doc. #141). However, Plaintiffs' objection merely asks that the court not enter judgment before ruling on their motion for reconsideration. The court denied that motion in an order

(Doc. #145) filed on March 2, 2007. Plaintiffs present no other argument against entering judgment for the Todices. Accordingly, the court finds no just reason to delay the entry of final judgment and directs that such judgment be entered with respect to the Todice Defendants.

IT IS THEREFORE ORDERED:

That the Alessio Defendants' Motion for Rule 54(b) Judgment (Doc. #151) is granted;

That pursuant to the order (Doc. #109) granting Kristine and Steve Alessio's motion for summary judgment, and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk of Court shall enter judgment in their favor.[1]

IT IS FURTHER ORDERED:

That pursuant to the order (Doc. #109) granting Harry and Ruth Todice's motion for summary judg-

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[1] The Court notes that the Clerk of court issued a Taxation of Costs Order (Doc. #154) awarding costs to Kristine and Steve Alessio on March 14, 2007.

ment, and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk of the court shall enter judgment in their favor.[2]

DATED this 5th day or April, 2007.

/s/
Edward C. Voss
United States magistrate Judge

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[2] The Court notes that the Clerk of Court issued a Taxation of Costs Order (Doc. #155) awarding costs to Harry and Ruth Todice on March 14, 2007.

APPENDIX B:

Decision of 9th Circuit Court of Appeals.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER MORLEY; et al.,)	) No. 07-15840
	) D.C. No. CV-04-
	) 01874-EVC
Plaintiffs – Appellants,	)
	)MEMORANDUM"'
	)
v.	)
	)
LORRE SMITH; et al.,	)
	)
Defendants,	)
	)
and	)
	)
KRISTINE C ALESSIO; et al.	)
	)
Defendants – Appellees.	)
_____	)

Appeal from the United States District Court
For the District of Arizona
Edward C. Voss, Magistrate Judge, Presiding

Argued and Submitted December 11, 2008
San Francisco, California

Before: TASHIMA, BERZON and N.R. SMITH, Circuit Judges.

*** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Christopher and Arden Morley (the "Morleys) appeal the district court's dismissal of their defamation and defamation per se claims against all defendants under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(60") and the magistrate judge's grant of summary judgment under Federal rule of Civil Procedure 56 ("Rule 56") with respect to all of their other claims against Steve and Kristine Alessio (the "Alessios"), and Harry and Ruth Todice (the "Todices"). We have jurisdiction pursuant to 28 U.S.C. § 1291 NS 28 U.S.C. § 636(C)(3). We affirm.

1. We review de novo a district court's decision to grant summary judgment. *Thomas v. City of Beaverton,* 379 F.3d 802, 807 (9th cir. 2004). After reviewing the evidence in the light most favorable to the Morleys, we conclude that no genuine issues of material fact remain. The magistrate judge correctly applied the relevant substantive law to the Morleys' intentional interference with prospective advantage, trade libel, intentional infliction of emotional distress, and loss of consortium claims. *See Olsen v. Idaho State Bd. Of Medicine*, 363 F.3d 916, 922 (9th Cr. 2004), Because this is a diversity case, we apply the substantive law of Arizona.

To prevail on their intentional interference with prospective advantage claim, the Morleys must prove, *inter alia*, that the Alessios and the Todices knew of the allegedly destroyed contractual relationship or business expectancy, and that their improper and intentional interference with that relationship induced or caused a breach of the contract or termination of the expectancy. *Miller v. Servicemaster by Rees*, 851 P.2d 143, 146 (Ariz. Ct. App. 1992). The Morleys did not produce evidence that meets their burden of proof. The

only business expectancy evidence the Morleys offered was that Kristine Alessio and Arden Morley had a planned sale between them. This business expectancy cannot support a claim against the Alessios, however, because Arizona law demands that the expectancy must exist between the plaintiff and a third party, not the plaintiff and defendant. *See Campbell v. Westdahl*, 715 P.2d 288, 294-95 (Ariz. Ct. App. 1985). Further, the Morleys offered no evidence that the Todices knew of the Alessio/Morley business relationship. Accordingly, the magistrate judge appropriately granted summary judgment as to both the Alessios and the Todices.

To prevail on their trade libel claim, the Morleys must prove that the Alessios and the Todices intentionally published an injurious falsehood disparaging the quality of the Morleys' property, and that the publication res8lted in a pecuniary loss to the Morleys. *See Gee v. Pima County*, 612 P.2d 1079 (Ariz. Ct. App. 1980). The Morleys cannot prevail on their trade libel claim for two reasons. First, they have not adduced any facts that support a finding that either the Alessios or the Todices published any false information. All claimed-of communications derived from Kristine Alessio's and Ruth Todice's belief that Arden Morley filed inconsistent registration forms with TICA, and Arden Morley admitted to filing "inaccurate" forms. Second, the Alessios and the Todices asset the conditional privilege applicable to trade libel and defamation claims, which applies if they "act[ed] in furtherance of some interest of social importance" and can thus be said to have a qualified privilege to make the statements. *Green Acres Trust v. London*, 688 P.2d 617, 620 (Ariz. 1984). Arizona law provides a two-part test for deter-

mining whether a action is so privileged: (1) there must be an occasion for the privilege and (2) the occasion for the privilege must not be abused. *Id.* at 624. We agree with the magistrate judge that communications within TICA regarding the accuracy of the Morleys' breeding implicates the privilege. Whether the privilege is abused is a question of fact typically reserved for the jury, thought a court may find that there was abuse in the absence of evidence of "actual malice" or "excessive publication". *Id.* The Morleys did not present any evidence of actual malice or excessive publications. Accordingly, the magistrate judge appropriately granted summary judgment.

To sustain their claim for intentional infliction of emotional distress, the Morleys must provide proof that the Alessios and the Todices: (1) engaged in intentional or reckless conduct, (2) that was extreme and outrageous, and (3) caused the Morleys (4) severe emotional distress. *Midas Muffler ship v. Ellison*, 650 P.2d 496, 499 (Ariz. Ct. App. 1982). The Morleys cannot show any extreme and outrageous conduct. Accordingly, the magistrate judge appropriately granted summary judge.

Loss of consortium is a derivate claim in Arizona; to succeed, the Morleys must prove that the Alessios and the Todices committed an underlying tort against Arden Morley. *Barnes v. Outlaw*, 964 P.2d 484, (Ariz. 1998). As discussed above, all claims against the Alessios and the Todices wee properly dismissed. Accordingly, the magistrate judge appropriately granted summary judgment as well.

2. We review de novo a motion for dismissal for failure to state a claim. *Miller v. Yokohama Tire Corp.*,

358 F/3d 616, 619 (9th Cir. 2004). If matters outside the pleadings are submitted, the motion to dismiss under rule 12(b)(6) is treated as one for summary judgment under Rule 56. *See* Fed.R.Civ.P. 12(b); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F/2d 1496, 1507-08 (9th Cir. 1990).

In considering the Alessios' motion to dismiss, the district court concluded that the alleged defamatory publications were not made to people outside TICA membership, a fact that was not part of the pleadings. We assume that the district court did not simply fabricate this information, and thus concluded its source must have been argument and/or evidence outside the four corners of the complaint. Accordingly, the district court's failure to exclude this information converted the motion to dismiss into a request for summary judgment, and we now review the district court's dismissal as an order granting summary judgment. *See Jacobsen v. AEG Capital Corp.*, 50 F.3d 1493, 1496 (9th Cir. 1995).

We note that when converting a motion to dismiss to a motion for summary judgment, a judge is required to give the parties a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R.Civ.P. 12(b). Our Circuit precedent does not, however, "require strict adherence to formal notice requirements." *Olsen*, 363 F/3d at 922; *Garoux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984). Because (a) the parties briefed and argued a motion for summary judgment that included a trade libel claim, (b) the briefing and arguments on this issue provides the information we need to consider the defamation and defamation per se claims on a summary judgment standard, and (c) we have that record before us, we conclude that

both parties had the "reasonable opportunity" Rule 12(b) requires.

To establish defamation in Arizona, the Morleys must prove that Alessio and Todice (a) made a knowingly false statement that defamed the Morleys, (b) acted in reckless disregard to the truthfulness of the statements, or (c) acted negligently in failing to ascertain the truth of the statements. *See Peagler v. Phoenix Newspaper, Inc.*, 560 P.2d 1216, 1222 (Ariz. 1977); Restatement 2d of Torts § 580B. To establish defamation per se, the Morleys must additionally be able to show that Alessio and Todice made the statements with the intent to disrupt the Morleys' business and prevent others from dealing with them. *See Western Tech., Inc. v. Sverdrup & Parcel, Inc.*, 739 P.2d 1318, 1321 (Ariz. Ct. App. 1986) (discussing the elements for "injurious falsehood").

As a threshold matter, we find that the Morleys have not presented any evidence to suggest that the alleged defamatory statements were false. Arden Morley's deposition testimony included an admission that she filed inaccurate registrations for two cats. Accordingly, the "concerns" Kristine Alessio expressed in her email, and the basis for the petition drive engaged in by Ruth Todice, were based on fact, and after ample opportunity for discovery, the Morleys could not provide sufficient evidence to meet their burden of showing that the statements were false. Even if the alleged defamatory statements were false, however, the Alessios and Todices rightfully asserted a conditional privilege defense, as discussed above. The Morleys presented no evidence to suggest that the Alessios or Todices abused the conditional privilege. Accordingly,

even if they had provided evidence that either the Alessios or the Todices made false statements, the Morleys did not show that they were defamatory or defamatory per se under Arizona law.

AFFIRMED.

APPENDIX C:

Order Denying Rehearing in court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christopher and Arden Morley	)	No. CV-04-1874-PCT-ECV
Plaintiffs,	)	
	)	**ORDER**
v.	)	
LORRE SMITH; et al.,	)	
Defendants,	)	

Pending before the court is Plaintiffs' Motion for Reconsideration and Motion for Rehearing in which they challenge the court's order granting summary judgment in favor of the Todices and Alessions. Doc. #136. Plaintiffs argue that the court should have applied Texas law rather than Arizona law. They further contend that the court erred by failing to find a genuine issued of material fact for a jury to decide. Lastly, they contend that the court improperly analyzed the law with respect to reach of Plaintiffs; claims.

Motions for reconsideration should be granted only in rare circumstances. Defenders of Wildlife v. Browner, 909 F. supp. 1342, 1351 (D.Ariz. 1995). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." School Dist. No. 1J, Multnomah county v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). Such motions shall not be used for the purposes of asking a court ""to rethink what the court had already thought through – rightly or wrongly." Defenders of Wildlife, 909 F.Supp. at 1351 (quoting Above the Belt, Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D.Va. 1983)).

1. Choice of Law

Plaintiffs contend that the court should have performed a choice of law analysis before deciding the motions for summary judgment. They claim that had the court done a choice of law analysis, it would have determined that Texas law applies and the result would have been different.

Plaintiffs did not raise this issue in their responses to the motions for summary judgment. See Doc. #88, #92. In fact, they essentially concede in their responses that Arizona law applies by citing it to support their arguments. Nowhere do they refer to Texas law or give any indication whatsoever that they believe Texas law should apply to their claims. In addition, as the Todice Defendants point out in their recent filing, Plaintiffs complaint alleges:

All acts and events either occurred in the District court or resulted in damages occurring in Arizona. Defendants, and each of them, have purposefully directed their tortuous activities at Plaintiff, a resident of the State of Arizona and the defamatory statements have been published and disseminated in the State of Arizona.

Plaintiffs' disingenuous claim that the court erred by failing to apply Texas law when they and the defendants all applied Arizona law to support their arguments is rejected. Reconsideration will not be granted on this basis.

2. Failure to Find a Genuine Issue of Material Fact

Next, Plaintiffs challenge Judge Carroll's decision grating Defendants' motion to dismiss with respect to the defamation claim. They argue that the complaint adequately alleges malice such that Judge Carroll should not have applied the conditional privilege. The order granting the motion to dismiss Plaintiffs' defamation claim was issued on July 13, 2005. the time to reconsider the order passed a long time ago. See LRCiv 7.2(g) (motion to reconsider must be filed within 10 days of the subject order). The court will not reconsider the order.

With respect to this court's summary judgment order, Plaintiffs fail to show that the court erred in finding no genuine issues of material fact. Accordingly, Plaintiff's request for reconsideration on this basis will be denied.

3. Legal Analysis of Claims

Plaintiffs final argument in support of their motion for reconsideration is that the court failed to properly analyze the law that applied to each claim. Plaintiffs contend that sufficient evidence existed to support the elements of each claim. Plaintiffs' arguments, however, fail to satisfy the standard for reconsideration. They have not shown newly discovered evidence, clear error or an intervening change in controlling law. Accordingly, Plaintiffs' request for reconsideration based on the court's legal analysis will be denied.

IT IS THEREFORE ORDERED:

That Plaintiffs' Motion for Reconsideration and Motion for Rehearing (Doc. #136) is **denied.**

DATED this 1st day or March, 2007.

_____/s/_____
Edward C. Voss
United States magistrate Judge